89-1171

Supreme Court, U.S.
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NO. 89-

in the Supreme Court of the United States

OCTOBER TERM 1989

LUIS ROBERTO GONZALEZ-SENTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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26 pp

QUESTIONS PRESENTED

I.

WHETHER PETITIONER WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE TRIAL COURT ALLOWED THE GOVERNMENT TO INTRODUCE EVIDENCE OF A FOREIGN DRUG CONVICTION, WHERE THE CONVICTION WAS ONLY MINIMALLY RELEVANT BUT EXTREMELY PREJUDICIAL TO THE DEFENSE?

II.

WHETHER PETITIONER WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE TRIAL COURT ALLOWED THE PROSECUTION TO INTRODUCE AGENCY ADMISSIONS AGAINST PETITIONER, IN THE ABSENCE OF SUFFICIENT PROOF OF AGENCY AND WHERE THE EVIDENCE WAS NOT WITHIN THE CHARGED CONSPIRACY?

LIST OF INTERESTED PERSONS

The only persons and entities having an interest in the outcome of this case are the Petitioner, his family, and the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Procedural Status	3
B. The Facts	4
REASONS FOR GRANTING THE WRIT	5
I. PETITIONER WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE TRIAL COURT ALLOWED THE GOVERNMENT TO INTRODUCE EVIDENCE OF A FOREIGN DRUG CONVICTION, WHERE THE CONVICTION WAS ONLY MINIMALLY RELEVANT BUT EXTREMELY PREJUDICIAL TO THE DEFENSE	5

TABLE OF CONTENTS—Continued

	Page
II. PETITIONER WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE TRIAL COURT ALLOWED THE PROSECUTION TO INTRODUCE AGENCY ADMISSIONS AGAINST PETITIONER, IN THE ABSENCE OF SUFFICIENT PROOF OF AGENCY AND WHERE THE EVIDENCE WAS NOT WITHIN THE CHARGED CONSPIRACY	12
CONCLUSION	16
APPENDIX	App. 1

TABLE OF AUTHORITIES

Cases	Page
Bourjaily v. United States, 483 U.S. ___, 107 S.Ct. 2775 (1987)	13
Boyd v. United States, 142 U.S. 450, 12 S.Ct. 22 (1892)	11
United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244 (1979)	8
United States v. Carrascal-Olivera, 755 F.2d 1446 (11th Cir. 1985)	8
United States v. Dothard, 666 F.2d 48 (11th Cir. 1982)	8
United States v. Frick, 588 F.2d 531 (5th Cir.), *cert. denied*, 441 U.S. 913, 99 S.Ct. 2013 (1979)	11
United States v. Gonzalez-Senti, ___ F.2d ___ (11th Cir. 1989)	1, 4
United States v. Jones, 766 F.2d 412 (th Cir. 1985)	14
United States v. Mitchell, 666 F.2d 1385 (11th Cir.), *cert. denied*, 457 U.S. 1124, 102 S.Ct. 2943 (1982)	9
United States v. Pacelli, 491 F.2d 1108 (2d Cir.), *cert. denied*, 419 U.S. 826, 95 S.Ct. 43 (1974)	14

TABLE OF AUTHORITIES—Continued

Cases	Page
United States v. Pena, 527 F.2d 1356 (5th Cir.), *cert. denied*, 426 U.S. 949, 96 S.Ct. 3168 (1976)	13
United States v. Rodriguez-Hernandez, 493 F.2d 168 (5th Cir. 1974), *cert. denied*, 422 U.S. 1056, 95 S.Ct. 2678 (1975)	11
United States v. Terebecki, 692 F.2d 1345 (11th Cir. 1982)	10
United States v. Wyatt, 762 F.2d 08 (11th Cir. 1985), *cert. denied*, 475 U.S. 1047, 106 S.Ct. 1266 (1986)	9
Other Authorities	
United States Constitution	
Fifth Amendment	2
Sixth Amendment	2, 15
Federal Rules of Evidence	
Rule 404	2, 8
Rule 801	3, 13

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OCTOBER TERM 1989

LUIS ROBERTO GONZALEZ-SENTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Luis Roberto Gonzalez-Senti, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case, which affirmed his conviction and sentence in the United States District Court for the Southern District of Florida.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed Petitioner's criminal conviction and sentence in a per curiam decision announced September 7, 1989. *United States v.*

Gonzalez-Senti, ___ F.2d ___ (11th Cir. 1989). That decision is reproduced in the Appendix. The appellate court denied rehearing on October 23, 1989. That order is reproduced in the Appendix. The trial court did not render any written opinions specifically directed to the questions presented in this certiorari petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). Justice Kennedy extended the time for filing the certiorari petition until January 6, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

No person shall be deprived of life, liberty, or property without due process of law. . .

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him. . .

Federal Rules of Evidence

Rule 404(b):

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 801(d)(2):

> **Admission by Party-Opponent.** The statement is offered against a party and is (a) the party's own statement in either an individual or a representative capacity or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

A. Procedural Status.

Luis Roberto Gonzalez-Senti was one of eight men accused of participating in a cocaine distribution conspiracy in the Southern District of Florida. The jury convicted all defendants who went to trial. The jury found Gonzalez-Senti guilty on Count 1 (conspiracy), but not guilty on Counts 2 and 3 (possession with intent to distribute cocaine). The lower tribunal sentenced Gonzalez-Senti to a prison term of 35 years, and imposed a $100,000 fine. He has been incarcerated during the pendency of his appellate proceedings.

Gonzalez-Senti appealed to the Eleventh Circuit. In his brief, Gonzalez-Senti raised two issues: (1) whether the trial court erred in allowing the government to introduce evidence of a foreign drug conviction; and (2) whether the trial court correctly allowed the prosecution to introduce agency admissions, where there was an absence of proof of agency. The appellate court, on September 7, 1989, affirmed Gonzalez-Senti's conviction and sentence in a per curiam affirmance without written opinion. *United States v. Gonzalez-Senti*, ___ F.2d ___(11th Cir. 1989). The court denied rehearing on October 23, 1989.

B. The Facts.

This case involves a cocaine smuggling venture. The government presented evidence tending to show that the charged defendants participated in a scheme to fly cocaine from Colombia to South Florida, at which point the cocaine was to be dropped to awaiting speedboats for transportation into the United States. The government's evidence consisted of military and law enforcement personnel who followed the smuggling aircraft and chased the speedboat ultimately arresting its occupants. The government also presented the testimony of former codefendant Peters, who gave the jury an inside view of the planning and carrying out of the cocaine importation and distribution operation. Peters was the pilot of the cocaine-laden airplane. The government additionally corroborated some of Peters's testimony through other witnesses.

The only government witness who connected Gonzalez-Senti to the cocaine operation was former codefendant Peters, the pilot of the cocaine smuggling aircraft. In exchange for favorable treatment, he agreed to cooperate with the government. Peters testified that Gonzalez-Senti attended meetings, that Gonzalez-Senti

offered to pay Peters $150,000 to fly cocaine from Colombia to the Bahamas, and that Gonzalez-Senti paid $250,000 for the airplane. Peters described Gonzalez-Senti as the overall coordinator of the smuggling venture.

Over vigorous defense objection, the government was permitted to introduce statements purportedly made to Peters by a Bahamian lawyer and a bondsman, to the effect that Gonzalez-Senti had arranged for these professional services to be provided to Peters. The government case also included evidence that Gonzalez-Senti was arrested in December 1983 (more than three years prior to the events for which Gonzalez-Senti was on trial and roughly four years before the trial) by Bahamian authorities for possession of cocaine on a speedboat. That arrest led to a 1984 Bahamian conviction. The government did not attempt to demonstrate that any of the elements involved in the case on trial were the same as or similar to those needed for a Bahamian conviction.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE TRIAL COURT ALLOWED THE GOVERNMENT TO INTRODUCE EVIDENCE OF A FOREIGN DRUG CONVICTION, WHERE THE CONVICTION WAS ONLY MINIMALLY RELEVANT BUT EXTREMELY PREJUDICIAL TO THE DEFENSE.

This case raises a question which is fundamental to criminal law: Can a defendant receive a fair trial when the government introduces evidence of a foreign drug conviction in an effort to prove that the defendant

should be convicted of drug conspiracy? In this case, Petitioner raised as his principal issue on appeal that he was improperly convicted when the government was permitted to introduce evidence of a Bahamian drug conviction, which occurred more than 3-1/2 years before the events for which he was on trial, which involved dissimilar facts, and which was not shown to require the same kind of intent as the charges for which Petitioner was on trial. The ultimate effect of this testimony was that the prosecution was able to convince the jury that if Petitioner was previously involved with cocaine, he must be a member of the charged conspiracy. Yet, that was not what this case was about, nor was it a permissible consideration on the jury's part. Gonzalez-Senti was supposed to be on trial only for participating in a very specific cocaine smuggling operation that took place in March and April of 1987. By permitting the government to prove that Gonzalez-Senti was a cocaine smuggler under Bahamian law at a completely different time and under different circumstances, Petitioner was unfairly compromised in his ability to mount a defense and have his guilt assessed on the basis of facts relevant to the criminal case.

This collateral evidence of a Bahamian arrest and conviction was presented during the prosecution's case in chief, not after defense presentation of evidence. The government's proof went far beyond the fact of a conviction, but included a presentation of the underlying acts. The challenged evidence which forms the basis for this petition was that Gonzalez-Senti had been arrested by Bahamian police in December 1983 for possession of 2,300 pounds of cocaine on a speedboat. Although the government argued that the limited purpose of this evidence was to show Gonzalez-Senti's intent to commit the charged crimes, the prosecution made no showing, whether by way of

proffer or presentation of evidence, that the intent required for the Bahamian drug conviction was similar to the required elements for a federal cocaine prosecution. In fact, the government never made a showing or even suggested in argument that a Bahamian conviction requires proof of specific intent, as opposed to a strict liability offense. How could a jury use this foreign conviction as proof of intent if there was no showing that any intent was required for the foreign conviction? This rhetorical question is proof positive that the government's purpose for introduction of this collateral "conviction" was merely to demonstrate that Gonzalez-Senti was a convicted drug dealer. That the jury acquitted him of the substantive charges and yet convicted him of the conspiracy is a graphic example of the prejudice which resulted from the introduction of this unwarranted evidence.

In affirming this case without opinion, the appellate court decided the case in a manner which conflicts with available precedent. There is no dispute that the Bahamian drug "conviction" involved circumstances dissimilar to the events for which Gonzalez-Senti was on trial. Likewise, there is no disagreement that the government did not even attempt to show that the Bahamian charge was a specific intent crime. What the government did do, which is also undisputed, is introduce the facts of a totally separate and immaterial incident of drug possession and ultimate conviction, so that the jury could conclude that Gonzalez-Senti was a drug dealer. Advising the jury that Gonzalez-Senti was a convicted drug dealer was tantamount to telling the jury that Gonzalez-Senti had a criminal purpose in associating with the coconspirators.

The general rule regarding admissibility of "other crimes" evidence is set forth in Rule 404(b) of the Federal Rules of Evidence. That Rule states:

> (b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The scope of this Rule was discussed at length in *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244 (179). *Beechum* underscored that collateral crimes evidence is not admissible unless the moving party is able to demonstrate relevance to an issue (such as intent, motive, opportunity, or common scheme, plan or design) other than propencity to commit a crime. The government did not meet that burden in this case.

To be admissible on the issue of intent, the evidence must show that the accused "possessed the same state of mind in the commission of both the extrinsic act [Bahamian charge] and the charged offense." *United States v. Dothard*, 666 F.2d 498, 502 (11th Cir. 1982). The Bahamian transactions are not probative of Gonzalez-Senti's state of mind with respect to the acts charged in the indictment because there is no logical nexus between the acts in the Bahamas and those involved in the indictment. There was no testimony whatsoever to even suggest that the Bahamian charges required any type of specific intent, as was required to prove the charges in the case for which Gonzalez-Senti was on trial. *United States v.*

Carrascal-Olivera, 755 F.2d 1446 (11th Cir. 1985). Indeed, there is nothing in this case to demonstrate whether possession of a controlled substance in the Bahamas is a strict liability crime or whether it requires proof of intent. Thus, on this point it cannot be said that the government met its required burden of proving similar intent between the extrinsic and charged acts, a critical omission since the prosecution introduced this evidence for the ostensible purpose of proving intent.

In *United States v. Wyatt*, 762 F.2d 908, 910 (11th Cir. 1985), *cert. denied*, 475 U.S. 1047, 106 S.Ct. 1266 (1986), the court further explored the admissibility of extrinsic act evidence when introduced for the purpose of establishing intent. The court held that:

> Evidence of an extrinsic act still must meet a two-pronged test to be admissible. The act must be relevant to an issue other than character and the probative value must not be substantially outweighed by undue prejudice. [citations omitted].
>
> When the issue is intent, the test for relevance is whether the extrinsic acts and the charged offense require the same type of intent and are close in time. *United States v. Mitchell*, 666 F.2d 1385, 1398 (11th Cir.), *cert. denied*, 457 U.S. 1124, 102 S.Ct. 2943 (1982).

When the circumstances of the present case are analyzed under any relevant standard, it should be obvious that the government failed to establish its burden of demonstrating admissibility, and the trial court abused its discretion in permitting the jury to consider this evidence.

The appellate court's approval of the lower tribunal's decision is a grievous constitutional error,

especially where the entire defense in this case was not intent, but was a dispute over Petitioner's identity.[1] Because it is plain that intent was *not* the disputed issue at trial, proving Petitioner's guilt by establishing that he is a convicted drug dealer under the guise of proving intent is not worthy of our constitutional system of fundamental fairness.

This Court must be in a position to chastise the government when it raises straw issues in an effort to introduce outrageously prejudicial and otherwise inadmissible evidence against a criminal defendant. The appellate court's approbation of this government approach has the practical effect of converting every prosecution into a trial of honor, in which a defendant who has any negative past is likely to have to defend against every uncharged act of misconduct imaginable. Since the introduction of this contested evidence was enough, by itself, to convince the jury that Gonzalez-Senti was the person who conspired with other defendants, the error could not be considered harmless. The precedent set by this case, moreover, is sufficiently dangerous to require attention by this Court.

The Bahamian incident, additionally, occurred 3-1/2 years before Gonzalez-Senti's arrest on these charges. When the issue to be proved by introduction of a prior crime is intent, the temporal proximity between the extrinsic act and the charged offense is a crucial factor. *See United States v. Terebecki*, 692 F.2d 1345, 1349 (11th Cir. 1982) (extrinsic offense 15 months after charged offense not too remote where extrinsic offense

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[1]Defense counsel stated at trial that the issue was identity. No dispute was raised that the individual who was the subject of coconspirator Peters's testimony acted with the intent to participate in a conspiracy.

conduct was very similar to conduct in charged offense). The temporal proximity factor is absent here.

Most importantly, the disputed Bahamian evidence had absolutely no similarity to the offense at issue in this case. Unfair prejudice inheres in a prosecution in which the government introduces damaging evidence of some other unrelated act of the defendant. *See, e.g., United States v. Frick*, 588 F.2d 531, 537 (5th Cir.), *cert. denied*, 441 U.S. 913, 99 S.Ct. 2013 (1979) (trial court committed prejudicial error by admitting testimony regarding coconspirator's sexual contact with codefendant's secretary to prove that sexual favors were an inducement to participate in fraud conspiracy, where there was insufficient other evidence of participation). The danger of misuse of extrinsic evidence is especially acute in a conspiracy prosecution with multiple defendants. Even with limiting instructions, a jury is likely to give undue weight to the evidence of the uncharged act and to render a verdict on the basis of that extrinsic evidence. In a case in which other defendants were shown to have directly possessed the cocaine but Gonzalez-Senti was not, any suggestion that Gonzalez-Senti had "hands on" participation in a foreign drug scheme is the type of proof that even a properly charged jury simply could not overlook.[1]

The use of this evidence to prove Gonzalez-Senti's criminal propensity ran afoul of Justice Harlan's remarks in *Boyd v. United States*, 142 U.S. 450, 458, 12 S.Ct. 292, 295 (1892);

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[1]Although a prior conviction can be used when evaluating the credibility of a witness, *see United States v. Rodriguez-Hernandez*, 493 F.2d 168 (5th Cir. 1974), *cert. denied*, 422 U.S. 1056, 95 S.Ct. 2678 (1975), this evidence was introduced during the prosecution's case in chief.

> However depraved in character, and however full of crime their past lifes may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

Gonzalez-Senti asked for no more than that. The appellate court's affirmance of a criminal conviction based on introduction of a wholly dissimilar and irrelevant foreign conviction does not comport with notions of due process. Petitioner requests that this Court issue a writ of certiorari in order to correct the constitutional injustice present in this case and clarify prevailing constitutional law. Such an evaluation of the case will result in the conclusion that Petitioner was deprived of fundamental fairness when the prosecution was permitted to utilize this insidious effort at character assassination in the guise of attempting to prove the elements of a crime.

II. PETITIONER WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE TRIAL COURT ALLOWED THE PROSECUTION TO INTRODUCE AGENCY ADMISSIONS AGAINST PETITIONER, IN THE ABSENCE OF SUFFICIENT PROOF OF AGENCY AND WHERE THE EVIDENCE WAS NOT WITHIN THE CHARGED CONSPIRACY.

So intent was the government on convicting Petitioner that it reached so far as to obtain a conviction based on so-called agency admissions, even though the evidence was neither relevant nor material. During the trial, the government elicited evidence that Gonzalez-Senti hired a lawyer to represent former coconspirator Peters in the Bahamas and that

Gonzalez-Senti was responsible for posting Peters's bail on the federal charges. Peters's supposed knowledge of these accusations came not from conversations with Gonzalez-Senti or with any other coconspirator, but from the unidentified lawyer and bondsman, neither of whom testified at trial. This evidence was, of course, introduced over the objection of defense counsel, but the court nevertheless allowed its introduction.

The government argued that this evidence was part of the "agency admission" exception to the hearsay rule, codified in Rule 801(d)(2)(D) of the Federal Rules of Evidence. The trial court agreed with this proposition, and allowed the jury to consider so-called agency admissions, subject to a limiting instruction that the witness's statements do "not prove that Luis Gonzalez-Senti did it. They can accept it and weigh it and judge the credibility as to whether or not it was a truthful statement by whoever that lawyer was." The trial court's ruling was plain wrong, and allowed the jury to consider inadmissible and patently prejudicial hearsay in deciding the guilty or innocence of Gonzalez-Senti. The appellate court compounded that legal injury by affirming Petitioner's conviction without so much as a single word of explanation.

Ordinarily, hearsay evidence is not admissible in a criminal case. Coconspirator statements, agency admissions, and similar vicarious statements can be presented as evidence against an accused. *E.g.*, *Bourjaily v. United States*, 483 U.S. ___, 107 S.Ct. 2775 (1987) (coconspirator statements); *United States v. Pena*, 527 F.2d 1356 (5th Cir.), *cert. denied*, 426 U.S. 949, 96 S.Ct. 3168 (1976) (out of court statements of an agent of a party admissible as vicarious admission). By affirming Petitioner's conviction, the appellate court disregarded the limitation on the rule of vicarious admissions, which permits consideration of an agency

admission only where the proponent of the evidence demonstrates that an agency relationship existed and that the statements were made during the scope of that relationship. *United States v. Pacelli*, 491 F.2d 1108 (2d Cir.), *cert. denied*, 419 U.S. 826, 95 S.Ct. 43 (1974). The fact of the agency may not be proved by the extrajudicial statements themselves, *United States v. Jones*, 766 F.2d 412 (9th Cir. 1985), contrary to the prosecutor's erroneous assertion at Gonzalez-Senti's trial.

Against these legal parameters, the appellate court was misled into considering the contested statements as agency admissions by the government's premise that an agency relationship was established through consideration of the statements themselves. To the contrary, there is not even a scintilla of evidence to suggest that the unknown lawyer or the unnamed bonsdman were agents of Gonzalez-Senti. The fact is that these service providers could have responded to anyone's request, perhaps even Peters himself. Gonzalez-Senti was in no position to establish the inaccuracy of the extrajudicial admissions. It is even unlikely that Gonzalez-Senti could have been responsible for arranging the appearance of the Bahamian lawyer, because Peters did not testify that Gonzalez-Senti knew of his predicament. It is simply too convenient for Peters to declare that the lawyer and bondsman were "sent" to him by Gonzalez-Senti. Petitioner could do nothing to offset this extremely damaging evidence, since the testimony did not reflect who these unnamed agents were and thus Gonzalez-Senti had no way to confront his accusers.

The testimony at issue was introduced to prove that Gonzalez-Senti dispatched the lawyer and bondsman to assist Peters, and therefore knowingly participated in the charged conspiracy. The court so

told the jury that it was up to them to make that assessment of the evidence. The evidence, of course, when considered for that purpose, was so damning to the defense case that Gonzalez-Senti had no hope of receiving a fair trial on evidence which he could confront.

This Court cannot allow the lower tribunal to establish precedent which would permit defendants to be convicted based on the unchallengeable word of another person who is not present at trial, who is not even named, and who is not available to be confronted. Clearly, the Sixth Amendment's confrontation clause requires at least that the defendant be able to know his accusers. That this was not done in this case warrants review by this court. The appellate court disregarded controlling precedent, which warrants this Court's use of the writ of certiorari to correct the injustice present herein.

CONCLUSION

For the reasons stated, this Court should grant a Writ of Certiorari to review the judgment of the court below.

Respectfully submitted,

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January 6, 1990

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-6074

D. C. Docket No. 87-10014

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS ROBERTO GONZALEZ-SENTI,
REYNALDO SOSA-VALDESPINO,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida (September 7, 1989)

Before VANCE, and COX, Circuit Judge, and Camp*, District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1

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*Honorable Jack T. Camp, U.S. District Judge for the Northern District of Georgia, sitting by designation.

Judgment Entered: September 7, 1989
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: November 1, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-6074

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS ROBERTO GONZALEZ-SENTI,
REYNALDO SOSA-VALDESPINO,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING
(September 7, 1989)

Before VANCE, and COX, Circuit Judge, and Camp*, District Judge.

The petition(s) for rehearing filed by Appellant Luis Roberto Gonzalez-Senti is *Denied.*

ENTERED FOR THE COURT:

United States Circuit Judge

* Honorable Jack T. Camp, U.S. District Judge for the Northern District of Georgia, sitting by designation.